

MORGAN, LEWIS & BOCKIUS LLP  
Nicole A. Diller (State Bar No. 154842)  
Donald P. Sullivan (State Bar No. 191080)  
Andrew C. Sullivan (State Bar. No. 226902)  
One Market, Spear Street Tower  
San Francisco, California 94105  
Telephone: (415) 442-1000  
Facsimile: (415) 442-1001

Attorneys for North Star Trust Company

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THOMAS FERNANDEZ, LORA SMITH,  
and TOSHA THOMAS

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.;  
K-M INDUSTRIES HOLDING CO., INC.  
ESOP PLAN COMMITTEE; WILLIAM  
E. AND DESIREE B. MOORE  
REVOCABLE TRUST; TRUSTEES OF  
THE WILLIAM E. AND DESIREE B.  
MOORE REVOCABLE TRUST;  
ADMINISTRATOR OF THE ESTATE OF  
WILLIAM E. MOORE, DECEASED; CIG  
ESOP PLAN COMMITTEE; and NORTH  
STAR TRUST COMPANY,

Defendants.

Case No. C06-07339 CW

**DEFENDANT NORTH STAR TRUST  
COMPANY'S ADMINISTRATIVE  
MOTION FOR AN ORDER REMOVING  
CONFIDENTIAL PORTIONS OF  
EXHIBITS 1, 2, 3, 9, 11, 33, 67, 72, AND 75  
TO THE DECLARATION OF NICOLE A.  
DILLER (DOCKET NO. 148) FROM THE  
PUBLIC RECORD AND PLACING THE  
REMOVED PORTIONS OF THE  
EXHIBITS UNDER SEAL**

**CIVIL LOCAL RULES 7-11, 79-5**

1 TO EACH PARTY AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT pursuant to Local Rules 7-11 and 79-5 of the Northern  
3 District of California, North Star Trust Company, by and through its undersigned counsel of  
4 record, hereby moves for an administrative order removing from the public record and placing  
5 under seal the portions of Exhibits 1, 2, 3, 9, 11, 33, 67, 72, and 75 to the declaration of Nicole A.  
6 Diller (Docket No. 148) that co-defendants K-M Industries Holding Co., Inc.; K-M Industries  
7 Holding Co., Inc., ESOP Plan Committee; and CIG ESOP Plan Committee ("K-M Defendants")  
8 have designated as confidential.

9 The parties stipulated to, and the Court entered, a Protective Order on March 16, 2007.  
10 Docket No. 29 ("Protective Order"). Under the terms of the Protective Order, a party was  
11 permitted to designate documents or testimony as "confidential" or "highly confidential –  
12 attorneys' eyes only." The K-M Defendants designated several documents as confidential  
13 through the course of this litigation. Defendant North Star inadvertently included some of the  
14 designated documents as exhibits to the Declaration of Nicole A. Diller (Docket No. 148) that it  
15 filed in support of its motion for summary judgment in the public record.

16 As explained in detail in the Declaration of Terence F. Young, filed herewith, the  
17 following portions of the identified Exhibits to the Declaration of Nicole A. Diller (Docket No.  
18 148) have been designated as confidential:

- 19 • Diller Declaration, Exhibit No. 1, pages KMH 001440-1444, KMH 001446, KMH  
20 001448-1474;
- 21 • Diller Declaration, Exhibit No. 2, pages 1-3 (KMH 005819-KMH 005821);
- 22 • Diller Declaration, Exhibit No. 2, pages 5-6 (KMH 005823-KMH 005824);
- 23 • Diller Declaration, Exhibit No. 2, pages 10-16 (KMH 005828-KMH 005834);
- 24 • Diller Declaration, Exhibit No. 2, page 20 (KMH 005838);
- 25 • Diller Declaration, Exhibit No. 2, pages 23-24 (KMH 005841-KMH 005842);
- 26 • Diller Declaration, Exhibit No. 2, pages 31-37 (KMH 005849-KMH 005855);
- 27 • Diller Declaration, Exhibit No. 2, page 52 (KMH 005870);
- 28 • Diller Declaration, Exhibit No. 3;

- Diller Declaration, Exhibit No. 9, pages 171-172;
- Diller Declaration, Exhibit No. 11;
- Diller Declaration, Exhibit No. 33;
- Diller Declaration, Exhibit No. 67, page 2, paragraphs 2 and 3;
- Diller Declaration, Exhibit No. 72, page 54; and
- Diller Declaration, Exhibit No. 75 (entire document).

Pursuant to the Protective Order, a party seeking to file confidentially-designated documents or information must comply with Local Rule 79-5 to seek the sealing of the documents. For the reasons stated above and in the accompanying Declaration of Terence F. Young, North Star requests that the above-listed documents be removed from the Declaration of Nicole A. Diller (Docket No. 148) and filed under seal.

Dated: July 2, 2008

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

/S/ Donald P. Sullivan

Nicole A. Diller

Donald P. Sullivan

Andrew C. Sullivan

Attorneys for Defendant North Star Trust  
Company

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Ronald Lovitt, Bar No. 040921  
J. Thomas Hannan, Bar No. 039140  
Henry I. Bornstein, Bar No. 75885  
Terence F. Young, Bar No. 069943  
LOVITT & HANNAN, INC.  
900 Front Street, Suite 300  
San Francisco, California 94111  
Telephone: (415) 362-8769  
Facsimile: (415) 362-7528  
*rl@lh-sf.com, jth@lh-sf.com, hib@lh-sf.com, tfylaw@earthlink.net*

Attorneys for Defendants K-M Industries  
Holding Co. Inc.; K-M Industries Holding Co.  
Inc. ESOP Plan Committee; and CIG ESOP  
Plan Committee

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

THOMAS FERNANDEZ, LORA SMITH  
and TOSHA THOMAS, individually and on  
behalf of a class of all others similarly  
situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC.,  
*et al.*,

Defendants.

) Case No. C06-07339 CW

)  
) **DECLARATION OF TERENCE F.**  
) **YOUNG ESTABLISHING THAT**  
) **INFORMATION DESIGNATED BY**  
) **NORTH STAR TRUST COMPANY IN**  
) **ITS ADMINISTRATIVE MOTION**  
) **FOR AN ORDER REMOVING**  
) **CONFIDENTIAL PORTIONS OF**  
) **EXHIBITS 1, 2, 3, 9, 11, 33, 67, 72, AND**  
) **75 TO THE DECLARATION OF**  
) **NICOLE A. DILLER (DOCKET NO.**  
) **148) FROM THE PUBLIC RECORD**  
) **AND PLACING THE REMOVED**  
) **PORTIONS OF THE EXHIBITS**  
) **UNDER SEAL IS SEALABLE**

**CIVIL LOCAL RULE 79-5(d)**

I, Terence F. Young, declare:

1. I am an attorney licensed to practice in the State of California and before this Court.  
I am associated with Lovitt & Hannan, Inc., attorneys for Defendants K-M Industries Holding Co.  
Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee, and CIG ESOP Plan Committee (the

1 “KMH defendants”) in this matter. I have custody of the relevant files of Lovitt & Hannan, Inc.  
2 related to this action and am familiar with the contents thereof. I make this declaration pursuant to  
3 L.R. 79-5(d) to establish that certain documents designated by defendant North Star Trust  
4 Company (“North Star”) to be confidential and addressed by North Star in its Administrative  
5 Motion for an Order Removing Confidential Portions OF Exhibits 1, 2, 3, 9, 11, 33, 67, 72, AND 75  
6 to the Declaration OF Nicole A. Diller (Docket No. 148) from the Public Record and Placing the  
7 Removed Portions of the Exhibits Under Seal (the “North Star Administrative Motion”) should be  
8 sealed and not made part of the Court’s public files.

9 2. K-M Industries Holding Co. Inc. (“KMH”) is a privately-held corporation comprising  
10 two operating subsidiaries, Kelly-Moore Paint Company and Capital Insurance Group. Prior to  
11 1999, KMH was known as Kelly Moore Paint Co., Inc. KMH maintains its financial and accounting  
12 records and other materials related to its operation and operating results in strictest confidence and  
13 treats such matters as trade secrets. KMH’s shares are not traded publicly and the estimated value of  
14 those shares is likewise a closely-guarded trade secret of KMH. Both of KMH’s subsidiaries are  
15 engaged in highly-competitive industries. Revealing KMH’s confidential information in the public  
16 records of this Court potentially could harm the privacy interests of KMH and put it and its  
17 subsidiaries at a competitive disadvantage.

18 3. Plaintiffs’ claims in the captioned lawsuit are premised on alleged violations of  
19 Employee Retirement Income Security Act (“ERISA”). In the context of such litigation, the courts  
20 have established that certain communications between ERISA Plan administrators, acting as  
21 fiduciaries, and the attorneys retained by them, that normally would be protected from discovery by  
22 the attorney-client privilege, are subject to a “fiduciary exception” to that privilege. As a  
23 consequence, the attorney-client privilege does not bar the discovery by Plan beneficiaries, such as  
24 plaintiffs in this action, of otherwise privileged communications. *United States v. Mett*, 178 F.3d  
25 1058, 1063 (9th Cir. 1999). Communications subject to the fiduciary exception retain their

1 privileged status as to anyone other than the fiduciary and the beneficiaries. Some documents and  
2 declarations submitted by the KMH defendants in support of their motion for summary judgment  
3 were produced in discovery in this matter because they were subject to the fiduciary exception.  
4 Nevertheless, the KMH defendants continue to claim privilege as to such documents and testimony  
5 and continue to assert a claim of privilege as to anyone other than defendants and plaintiffs in this  
6 lawsuit.

7 4. Among the issues raised by plaintiffs are claims primarily related to independent  
8 appraisals of the value of KMH's shares performed at the time of the formation of the ESOPs that  
9 are the subject of the lawsuit and more recently. Said appraisals were performed to value shares that  
10 are not traded publicly and were based on financial results that are not made publicly available by  
11 KMH.

12 5. Listed below are descriptions of the portions of the exhibits referred to in the North  
13 Star Administrative Motion. These descriptions provide the basis for KMH's claim that portions of  
14 such exhibits either are confidential or are protected by the attorney client privilege.

15 6. North Star mistakenly submitted the documents described below as exhibits to its  
16 motion for summary judgment without designating them as to be filed under seal notwithstanding  
17 that they were designated as Confidential by KMH in the course of discovery. This declaration is  
18 intended to supplement the earlier declaration describing documents designated as subject to sealing  
19 by North Star in connection with its earlier administrative motion.

20 7. **North Star Exhibit No. 1, pages KMH 001440-KMH 001444.**

21 This five-page portion of Exhibit 1 comprises an appraisal report by B. J. Brooks dated  
22 August 5, 1998. It describes the basis upon which the appraisers analysis was conducted and  
23 discusses financial and structural aspects of the business of KMH. Such information is maintained as  
24 strictly confidential by this privately-held company and its release to the general public and  
25 competitors could negatively affect KMH's competitive advantage. (This document was submitted

1 under seal by the Moore Trust Defendants as Exhibit C.)

2           8.       **North Star Exhibit No. 1, page KMH 001446.**

3           This one-page portion of Exhibit 1 comprises a market analysis of the business of the retail  
4 paint company operations of KMH. Such competitive analysis is maintained as strictly confidential  
5 by this privately-held company and its release to the general public and competitors could negatively  
6 affect KMH's competitive advantage. (This document was submitted under seal by the Moore Trust  
7 Defendants as Exhibit C.)

8           9.       **North Star Exhibit No. 1, pages KMH 001448-KMH 001474.**

9           This portion of Exhibit 1 comprises a description of the appraiser's analysis of the book  
10 value and financial condition of KMH, its earnings history and future earnings prospects, its  
11 dividend history, comparisons to competing companies, a description of the appraiser's evaluation  
12 process as it applied to the specifics of KMH's business, the appraiser's conclusions, balance sheets,  
13 income statements, earnings statement, financial ratios, and comparisons to competing companies.  
14 Such financial information and competitive analysis is maintained as strictly confidential by this  
15 privately-held company and its release to the general public and competitors could negatively affect  
16 KMH's competitive advantage. (This document was submitted under seal by the Moore Trust  
17 Defendants as Exhibit C.)

18           10.      **North Star Exhibit No. 2, pages 1-3 (KMH 005819-KMH 005821).**

19           This three page portion of Exhibit 2, an valuation by Duff & Phelps of the Class I tracking  
20 stock of KMH, comprises the conclusions of the appraisers of such value as of June 30, 1999, a  
21 general description of the business and operations (including financial performance) of CCIC, the  
22 KMH insurance subsidiary. Such financial information and operational data is maintained as strictly  
23 confidential by this privately-held company and its release to the general public and competitors  
24 could negatively affect KMH's competitive advantage.

1           11.     **North Star Exhibit No. 2, pages 5-6 (KMH 005823-KMH 005824).**

2           This two-page portion of Exhibit 2 comprises a discussion of risks, weaknesses and threats  
3 inherent in the business operations of the KMH insurance subsidiary. Such competitive analysis is  
4 maintained as strictly confidential by this privately-held company and its release to the general  
5 public and competitors could negatively affect KMH's competitive advantage.

6           12.     **North Star Exhibit No. 2, pages 10-16 (KMH 005828-KMH 005834).**

7           These seven page portion of Exhibit 2 comprises a financial overview of KMH operations,  
8 and includes a consolidated income statement for 1998 and 1999, and consolidated income  
9 statements, margin analyses and balance sheets for the period from 1993 through 1998. Such  
10 financial information and analysis is maintained as strictly confidential by this privately-held  
11 company and its release to the general public and competitors could negatively affect KMH's  
12 competitive advantage.

13          13.     **North Star Exhibit No. 2, page 20 (KMH 005838).**

14          This page from Exhibit 2 comprises a comparative analysis of KMH's financial results with  
15 the results of competitive publicly-held companies. Such competitive analyses are maintained as  
16 strictly confidential by this privately-held company and its release to the general public and  
17 competitors could negatively affect KMH's competitive advantage.

18          14.     **North Star Exhibit No. 2, pages 23-24 (KMH 005841-KMH 005842).**

19          This two page portion of Exhibit 2 comprises a financial analysis of KMH's insurance  
20 subsidiary in comparison with competitors. Such competitive analyses are maintained as strictly  
21 confidential by this privately-held company and its release to the general public and competitors  
22 could negatively affect KMH's competitive advantage.

23          15.     **North Star Exhibit No. 2, pages 31-37 (KMH 005849-KMH 005855).**

24          This seven page portion of Exhibit 2 comprises an analysis of the KMH insurance  
25 subsidiary's ranking vis-à-vis its competition and a financial analysis of the same issues using the



1 company's financial results. Such competitive analyses are maintained as strictly confidential by this  
2 privately-held company and its release to the general public and competitors could negatively affect  
3 KMH's competitive advantage.

4 **16. North Star Exhibit No. 2, page 52 (KMH 005870).**

5 This one page portion of Exhibit 2 comprises the appraiser's value conclusion concerning  
6 KMH's insurance subsidiary. Such financial information and estimates of the value of the shares of  
7 KMH are maintained as strictly confidential by this privately-held company and its release to the  
8 general public and competitors could negatively affect KMH's competitive advantage.

9 **17. North Star Exhibit No. 3 (entire document).**

10 Exhibit 3 is a valuation report on KMH dated May 17, 2007, prepared by Stout Risius Ross,  
11 Inc.. Like the other valuation reports submitted as exhibits in this matter, the SRR report contains  
12 detailed financial and marketing information on KMH, including the results of operations of both of  
13 its subsidiaries. Such financial and market information has been maintained as strictly confidential  
14 by this privately-held company and its release to the general public and competitors could negatively  
15 affect KMH's competitive advantage.

16 **18. North Star Exhibit No. 9, pages 171-172.**

17 Exhibit 9, portions of the deposition of Stephen Ferrari, Chief Financial Officer ("CFO") and  
18 secretary treasurer of KMH, comprises the substance of communications between him as an officer  
19 of Kelly-Moore Paint Company and its attorney, Cheryl Mills. The communications were testified  
20 to here pursuant to the fiduciary exception but, nevertheless, are subject to the attorney-client  
21 privilege as to third parties and should not become part of the public record.

22 **19. North Star Exhibit No. 11 (entire document).**

23 Exhibit 11 is a letter from KMH's ESOP advisor and attorney, John D. Menke & associates,  
24 to Prudential Insurance Company of America concerning financing. Such financial arrangements  
25

1 with Prudential have been maintained as strictly confidential by this privately-held company and its  
2 release to the general public and competitors could negatively affect KMH's competitive advantage.

3       **20. North Star Exhibit No. 33 (entire document).**

4       Exhibit 33 is a valuation report of KMH's insurance subsidiary prepared by Columbia  
5 Financial Advisors, Inc. It contains in depth confidential financial and market position information  
6 concerning the subsidiary's insurance operations. Such financial and market information has been  
7 maintained as strictly confidential by this privately-held company and its release to the general  
8 public and competitors could negatively affect KMH's competitive advantage.

9       **21. North Star Exhibit No. 72, page 54.**

10       Exhibit 72, portions of the deposition of Joseph Cristiano, former President of Kelly Moore  
11 Paint Company, Inc., comprises the substance of communications between him as an officer of  
12 Kelly-Moore Paint Company and its attorney, Cheryl Mills. The communications were testified to  
13 here pursuant to the fiduciary exception but, nevertheless, are subject to the attorney-client privilege  
14 as to third parties and should not become part of the public record.

15       **22. North Star Exhibit No. 67, page 2, paragraphs 2 and 3.**

16       Exhibit 67 is the minutes of a Board of Directors meeting of KMH and Kelly Moore Paint  
17 Company, Inc. dated March 18, 2003. The first two paragraphs on the second page of the minutes  
18 refer to and describe aspects of a financing arrangement between the companies and Prudential  
19 Insurance Company. Such financial arrangements with Prudential have been maintained as strictly  
20 confidential by this privately-held company and its release to the general public and competitors  
21 could negatively affect KMH's competitive advantage.

22       **23. North Star Exhibit No. 75 (entire document).**

23       Exhibit 75 is a valuation report on KMH as of December 31, 2000, prepared by Ireland  
24 Associates of Kentfield, California. Like the other valuation reports submitted as exhibits in this  
25 matter, the Ireland report contains detailed financial and marketing information on KMH, including

1 the results of operations of both of its subsidiaries. Such financial and market information has been  
2 maintained as strictly confidential by this privately-held company and its release to the general  
3 public and competitors could negatively affect KMH's competitive advantage.

4 I declare under penalty of perjury under the laws of the United States of America that the  
5 foregoing is true and correct.

6  
7 DATED: July 2, 2008

8  
9 /s/  
Terence F. Young

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THOMAS FERNANDEZ, LORA SMITH,  
and TOSHA THOMAS

Plaintiffs,

vs.

K-M INDUSTRIES HOLDING CO., INC.;  
K-M INDUSTRIES HOLDING CO., INC.  
ESOP PLAN COMMITTEE; WILLIAM  
E. AND DESIREE B. MOORE  
REVOCABLE TRUST; TRUSTEES OF  
THE WILLIAM E. AND DESIREE B.  
MOORE REVOCABLE TRUST;  
ADMINISTRATOR OF THE ESTATE OF  
WILLIAM E. MOORE, DECEASED; CIG  
ESOP PLAN COMMITTEE; and NORTH  
STAR TRUST COMPANY,

Defendants.

Case No. C06-07339 CW

**[PROPOSED] ORDER GRANTING  
DEFENDANT NORTH STAR TRUST  
COMPANY'S ADMINISTRATIVE  
MOTION FOR AN ORDER REMOVING  
CONFIDENTIAL PORTIONS OF  
EXHIBITS 1, 2, 3, 9, 11, 33, 67, 72, AND 75  
TO THE DECLARATION OF NICOLE A.  
DILLER (DOCKET NO. 148) FROM THE  
PUBLIC RECORD AND PLACING THE  
REMOVED PORTIONS OF THE  
EXHIBITS UNDER SEAL**

1 Having reviewed (1) Defendant North Star Trust Company's ("Defendant")  
 2 Administrative Motion For An Order Removing Confidential Portions of Exhibits 1, 2, 3, 9, 11,  
 3 33, 67, 72, and 75 to the Declaration of Nicole A. Diller (Docket No. 148) from the Public Record  
 4 and Placing the Removed Portions of the Exhibits Under Seal, and (2) the Declaration to Terence  
 5 F. Young Establishing that Information Designated by North Star Trust Company in its  
 6 Administrative Motion for an Order Removing Confidential Portions of Exhibits 1, 2, 3, 9, 11,  
 7 33, 67, 72, And 75 to the Declaration of Nicole A. Diller (Docket No. 148) from the Public  
 8 Record and Placing the Removed Portions of the Exhibits Under Seal is Sealable, and good cause  
 9 appearing for granting Defendant North Star's Motion, Defendant North Star's Motion is hereby  
 10 GRANTED. The Court orders that the following portions of the Exhibits attached to the  
 11 Declaration of Nicole A. Diller (Docket No. 148) be removed from the public record and placed  
 12 under seal:

- 13 • Diller Declaration, Exhibit No. 1, pages KMH 001440-1444, KMH 001446, KMH  
 14 001448-1474;
- 15 • Diller Declaration, Exhibit No. 2, pages 1-3 (KMH 005819-KMH 005821);
- 16 • Diller Declaration, Exhibit No. 2, pages 5-6 (KMH 005823-KMH 005824);
- 17 • Diller Declaration, Exhibit No. 2, pages 10-16 (KMH 005828-KMH 005834);
- 18 • Diller Declaration, Exhibit No. 2, page 20 (KMH 005838);
- 19 • Diller Declaration, Exhibit No. 2, pages 23-24 (KMH 005841-KMH 005842);
- 20 • Diller Declaration, Exhibit No. 2, pages 31-37 (KMH 005849-KMH 005855);
- 21 • Diller Declaration, Exhibit No. 2, page 52 (KMH 005870);
- 22 • Diller Declaration, Exhibit No. 3;
- 23 • Diller Declaration, Exhibit No. 9, pages 171-172;
- 24 • Diller Declaration, Exhibit No. 11;
- 25 • Diller Declaration, Exhibit No. 33;
- 26 • Diller Declaration, Exhibit No. 67, page 2, paragraphs 2 and 3;

27 ///

28 ///

- Diller Declaration, Exhibit No. 72, page 54; and
- Diller Declaration, Exhibit No. 75 (entire document).

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Claudia Wilken  
United States District Judge

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